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## **Religious Symbols in Germany**

by Tobias Lock\*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1709291](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1709291)

### **I. Introduction**

The status of religious symbols in German schools has been a hotly debated topic not only in legal circles but also in the wider public discussion for almost twenty years. The debate started with the conflict over the crucifix in classrooms, continued with the right of teachers to wear a headscarf at school and currently revolves around a possible ban of the headscarf for students.<sup>1</sup> This contribution examines these issues from a legal perspective. It is divided into three parts: the first part is concerned with religious symbols installed by the state while the second part deals with religious symbols worn by teachers. The final part will examine whether students can be prevented from wearing religious symbols. This chapter aims to deliver insights into the limits to the freedom of religion, the notion and content of the negative freedom of religion, the demand for neutrality of the German state in religious and philosophical matters, and the interpretation of symbols as religious. The contribution is mainly based on the case law of the Federal Constitutional Court (FCC) but also considers the legislation following these decisions, and judgments

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<sup>1</sup> Only recently a newly appointed minister of the *Land* Lower Saxony suggested that crosses should be banned from classrooms, cf. *Süddeutsche Zeitung*, 27 April 2010, page 2, while others demand that girls should not be allowed to wear a headscarf at school, cf. for instance the demands by Germany's most prominent feminist Alice Schwarzer, *Spiegel Online*, 21 September 2010, <http://www.spiegel.de/politik/deutschland/0,1518,718785,00.html> [13 November 2010].

rendered by inferior courts, especially with regard to that legislation and the German legislation transposing the EU's equality directives.

The legal framework for the following discussion is as follows: Article 4 of the German constitution, the Basic Law (*Grundgesetz*) guarantees freedom of religion, faith and conscience:

(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.<sup>2</sup>

According to German doctrine, freedom of religion has two aspects to it. Firstly, everyone enjoys positive freedom of religion. This means that everyone the right to adhere to a religion or to hold a belief (so-called forum internum). This includes atheism.<sup>3</sup> In addition, everyone has the right to behave strictly in accordance with the rules of one's belief and to act according to one's religious convictions (so-called forum externum). Secondly, negative freedom of religion, gives everyone the right not to share a certain belief.<sup>4</sup> The state must not interfere with either of these freedoms. It is especially prohibited from prescribing a belief.<sup>5</sup> Freedom of religion is a fundamental right enjoyed by everyone, including children and, of course, their parents.

Parents also enjoy a fundamental right to educate their children according to Article 6 (2) of the Basic Law:

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<sup>2</sup> The translation of all articles of the Basic Law quoted here can be found at: [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

<sup>3</sup> J. Kokott, in: M. Sachs (ed.), *Grundgesetz*, 4th edn., Verlag C.H. Beck, Munich 2007, Art. 4, para 18.

<sup>4</sup> *Supra*.

<sup>5</sup> BVerfGE 32, 98 (106); 93, 1 (15); 108, 282 (297).

The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

This right, however, is concurrent with the state's duty to educate, which is derived from Article 7 (1) of the Basic Law, which provides that the entire school system is under the supervision of the state.<sup>6</sup> Thus parents and the state share the responsibility to educate children.

It should further be pointed out that the organisation of schools is in the competence of the German states (*Länder*)<sup>7</sup>, which means that there are sixteen different sets of rules which govern the various relations between schools, students and staff. This means that there can never be one single answer to the questions revolving around religious symbols in German schools. Rather we have to compare sixteen different systems. What the *Länder*, of course, have in common is that their legislatures are bound by the constitutional limits on legislative regulation set by the Basic Law. It is the aim of this contribution to show what precisely these limits are and how the *Länder* have positioned themselves within these limits.

Finally, Germany does not have a state religion. It is a secular state. Article 137 of the Weimar Constitution forms an integral part of the Basic Law<sup>8</sup> and states that there shall be no state church. Moreover, it follows from the constitutional right to freedom of religion that the state has to be neutral in matters of religion and philosophy of life (*Weltanschauung*).<sup>9</sup> It is clear from a number of early decisions by the FCC that this neutrality must not be confused with the French and Turkish notions of *laïcité*, which postulate a

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<sup>6</sup> BVerfGE 34, 165 (183).

<sup>7</sup> Article 70 Basic Law.

<sup>8</sup> Article 140 Basic Law.

strict separation of religion and state.<sup>10</sup> Two decisions of the FCC concerned the legality of legislation passed in two *Länder* which introduced Christian schools. An amendment to the constitution of the *Land* Baden-Württemberg provided that primary schools (and some secondary schools) are Christian comprehensive schools<sup>11</sup> whereas the Bavarian constitution provided that children in public primary schools are educated according to Christian principles.<sup>12</sup> In the *Baden-Württemberg* case, the FCC held that the *Länder* enjoy a great degree of independence when it comes to organising public schools, which includes the religious orientation of these schools.<sup>13</sup> It refuted the argument that the state must keep aloof from introducing religious references into schools.<sup>14</sup> However, where the legislator chooses to introduce such references, the school must not proselytise or claim that Christian religious beliefs are binding. Rather such a school has to be open to other philosophical and religious positions and its educational mission must not be religious. The reference to Christianity is to be understood as the recognition of Christianity as a decisive factor in Western history and for Western culture.<sup>15</sup> The FCC made a similar statement in the decision on the provision of the Bavarian constitution.<sup>16</sup> The Basic Law therefore permits an 'open'

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<sup>9</sup> BVerfGE 93, 1 (16).

<sup>10</sup> On the French model cf. the contributions by McCrudden and Calvès in this volume; on Turkey cf. C. Karakas, Turkey: Islam and Laicism Between the Interests of State, Politics, and Society, Peace Research Institute Frankfurt, PRIF Reports No. 78, <http://www.hsfk.de/fileadmin/downloads/prif78.pdf> [13 November 2010].

<sup>11</sup> Article 15 of the Baden-Württemberg constitution.

<sup>12</sup> Article 135 of the Bavarian Constitution.

<sup>13</sup> BVerfGE 41, 29 (45).

<sup>14</sup> BVerfGE 41, 29 (48 et seq).

<sup>15</sup> BVerfGE 41, 29 (51 et seq).

<sup>16</sup> BVerfGE 41, 65 (78).

neutrality<sup>17</sup>. This openness towards religious elements introduced by the state into schools became again relevant in the FCC's decision surrounding the school prayer.<sup>18</sup> The FCC joined two cases. In the first case the parents of a primary school pupil complained that the practice to say a daily prayer before school began had been abandoned following an objection by another pupil. In the other case, the parents of a primary school pupil argued that a school prayer was incompatible with their child's negative freedom of religion. Only the first complaint was successful. The FCC recalled that it is possible for the *Länder* to introduce religious references into schools where the freedom of religion of all concerned is not violated.<sup>19</sup> It acknowledged that it constituted a promotion of Christianity if the state allowed a prayer to happen in school as part of the school day.<sup>20</sup> The FCC went on to argue that the school prayer was not a violation of the negative freedom of religion since the pupil had the possibility to escape it, be it by leaving the room or by simply not participating in the prayer.<sup>21</sup> Thus a school prayer is generally compatible with the Basic Law. The decision therefore shows that Germany does not follow the strict French and Turkish models of secularism but a more mollified version of it.

## II. Symbols Installed by the State: the Crucifix Controversy

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<sup>17</sup> Cf. H. Werdmölder, Headscarves in Public Schools, in: M. L. P. Loenen/J. Goldsmith (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, Intersentia, Antwerp 2007, 155.

<sup>18</sup> BVerfGE 52, 223.

<sup>19</sup> BVerfGE 52, 223 (238).

<sup>20</sup> BVerfGE 52, 223 (240).

<sup>21</sup> BVerfGE 52, 223 (248 et seq).

Almost fifteen years before the *Lautsi*<sup>22</sup> decision by the European Court of Human Rights (ECtHR) made the headlines, an almost identical case was decided by the Federal Constitutional Court.<sup>23</sup> Three siblings and their parents filed a constitutional complaint against the mandatory affixing of crucifixes and crosses in classrooms in Bavaria. The relevant provision in the Bavarian School Regulations for Elementary Schools (*Volksschulordnung*), provided that '[I]n every classroom a cross shall be affixed.' The parents were followers of the anthroposophical philosophy of life as taught by Rudolf Steiner. When one of their children started primary school, they found large crucifixes affixed to the walls of the classrooms in which she was taught. The crucifixes were in direct view of the blackboard. The parents requested that the crucifixes be removed. A compromise was found and the school replaced them with a plain crosses, which were affixed above the door. Some time later the parents unsuccessfully requested that the crosses in the classrooms be removed as well. The case ended up in the FCC, which in 1995 delivered one of the most controversial judgments in its history when it held that the affixing of a cross in a classroom violated the complainants' right to religious freedom.<sup>24</sup>

### 1. The FCC's Reasoning

The FCC held that the affixing of a cross in a classroom violated a pupil's negative religious freedom. The FCC defined negative religious freedom as

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<sup>22</sup> App. no. 30814/06 (*Lautsi v Italy*).

<sup>23</sup> BVerfGE 93, 1; an English translation can be found on the University of Texas' Foreign Law Translations website:  
[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=615](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=615).

the freedom to stay away from acts of worship of a faith not shared, which includes the freedom to stay away from the symbols of such a faith.<sup>25</sup> The FCC admitted that in a pluralist society an individual has no right to be completely spared from manifestations of other faiths. But the difference in the classroom was that the state itself created a situation where the individual was exposed to a religious symbol without any possibility of escape. The FCC's remarks on the cross as a religious symbol, the existence of an interference with freedom of religion and the neutrality of the state were most controversial at the time.

The FCC refuted the argument advanced by the Bavarian government that the cross was merely a symbol of Western culture marked by Christianity. The FCC argued that the cross still was the typical symbol of the Christian faith.<sup>26</sup> In interpreting the meaning of the cross as a Christian symbol, the FCC based this finding on an objective assessment of the cross and did not take the subjective intention of the state affixing the cross into account. The FCC distinguished the case from the school decisions referred to above. While it interpreted the Christian mission of these schools as the recognition of Christianity as an important element of Western history and of Western culture, it felt unable to interpret the cross in such a restrictive manner.

The FCC considered the cross to interfere with negative freedom of religion. The main argument was that the pupils could not escape the cross during lessons. Since education in primary schools was compulsory, students

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<sup>24</sup> In that sense the labelling of the decision as the 'crucifix' decision is a misnomer as the complaint was directed against plain crosses as well.

<sup>25</sup> BVerfGE 93, 1 (15).

<sup>26</sup> BVerfGE 93, 1 (19).



were thus forced to study 'under the cross'.<sup>27</sup> This fact of inescapability marked the difference to the school prayer decision discussed above. The school prayer only happened at the beginning of a lesson and pupils had the chance to leave the room or simply not participate. Further, the FCC referred to its decision on the cross in courtrooms, which it also had held to be unconstitutional since a duty to argue a case 'under the cross' constituted an unreasonable inner burden both for the lawyer and the party represented by him.<sup>28</sup> It was criticised that this case was not a good precedent since the FCC had relied on the subjective, inner burden in the actual case where both the party and the lawyer were former German nationals, who had to fled the country during the Nazi-era because they were Jewish.<sup>29</sup> In contrast to that case, the FCC in the crucifix decision no longer took the individual pupil into account but found crosses in classrooms to generally interfere with the freedom of religion. The FCC explicitly disagreed with the decisions of the inferior courts in the case which had held that the cross has no effect on pupils. While the FCC admitted that the cross did not require pupils to identify with it, it accorded an appellant character to it.<sup>30</sup> This means that the FCC considered that the students might interpret the cross as objectively proselytising and thus interfering with their negative freedom of religion.

The FCC did not regard this interference with freedom of religion to be justified. Negative freedom of religion was not an absolute right and, as was held in the decision on Christian schools and the school prayer, could be restricted because of the state's right to educate children arising from Article 7

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<sup>27</sup> BVerfGE 93, 1 (18).

<sup>28</sup> BVerfGE 35, 366.

<sup>29</sup> A. Frhr. v. Campenhausen, Zur Kruzifix-Entscheidung des Bundesverfassungsgerichts, 121 Archiv des Öffentlichen Rechts (1996), 448 (453).

of the Basic Law.<sup>31</sup> However, the FCC held that the affixing of a cross violated the neutrality of the state in matters of religion and philosophy of life. It conceded that it had acknowledged in the decisions on Christian schools that the state need not completely abandon all religious or philosophical references when educating children. However, when compulsorily educating children, the state had fulfil its duty in a non-proselytising fashion. The affixing of a cross was considered to go too.<sup>32</sup> Furthermore, the FCC made it clear that the positive religious freedom of the majority of pupils, who were Christian, could not override the right of the minority to be protected since fundamental rights were specifically aimed at their protection.<sup>33</sup>

## 2. Criticism

The decision of the FCC was not unanimous, however. Three of the eight judges rendered a dissenting opinion arguing that there was no violation of the claimants' freedom of religion. The minority argued on the basis of the school decisions according to which there is no a violation of the neutrality requirement if the *Länder* base schools on Christian values. This, they argued, also covered the affixing of a cross or crucifix in the classroom.<sup>34</sup> A similar point was made by *von Camphausen* who contended that if Christian schools were constitutional, then the cross as their symbol had to be constitutional, too.<sup>35</sup>

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<sup>30</sup> BVerfGE 93, 1 (20).

<sup>31</sup> Supra.

<sup>32</sup> BVerfGE 93, 1 (23 et seq).

<sup>33</sup> BVerfGE 93, 1 (24).

<sup>34</sup> BVerfGE 93, 1 (28).

<sup>35</sup> V. Campenhausen, n 29, 462; a similar point was made by J. Müller-Volbehr, Positive und negative Religionsfreiheit, 50 Juristenzeitung (1995), 996 (1997).

In addition, it was criticised that the FCC considered the exposure of pupils to the cross to constitute an interference with the negative freedom of religion of the non-Christian pupil.<sup>36</sup> One of the reasons advanced in the dissenting opinion is that negative freedom of religion did not constitute a superior fundamental right, which always trumped freedom of religion.<sup>37</sup> However, this contention by the minority is based on the wrong assumption that the case of the crucifix deals with a conflict between the positive freedom of religion of Christian pupils and the negative freedom of religion of non-Christian pupils, i.e. essentially a case on the horizontal application of fundamental rights (so-called *Drittwirkung*).<sup>38</sup> But that was precisely not the issue of the case. The question was whether a binding order by the state to affix crosses in classrooms was compatible with Article 4 of the Basic Law, which is a classical vertical situation where an act of the state interferes with fundamental freedoms.

Moreover, they contended that for a non-Christian pupil the cross could not be a religious symbol, but could only be a symbol for the values of a Christian school as outlined in the school decisions, i.e. a symbol representing the Christian and Western values. This argument is hardly convincing as it essentially negates the existence of negative religious freedom. Were it correct, it would mean that the exercise of a religion could never interfere with anyone's negative freedom of religion since they, as non-members of that particular religious group, would not be able to understand the meaning of

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<sup>36</sup> V. Campenhausen, n 29, 450; J. Kokott, in: M. Sachs (ed.), *Grundgesetz*, 4th edn., Verlag C.H. Beck, Munich 2007, Art. 4, para 39.

<sup>37</sup> BVerfGE 93, 1 (31 et seq).

<sup>38</sup> A similar point is made by Müller-Volbehr, n 35, 999.

their religious exercise and thus it would not have any religious meaning for them. It would merely constitute a nuisance.<sup>39</sup>

It was further argued that the effects of 'studying under the cross' were exaggerated and could not be proven.<sup>40</sup> In addition, the majority was criticised for not making any reference to the position of the cross in the classroom. It was maintained that it made a difference whether the cross was affixed within the view of the pupils or not.<sup>41</sup>

The decision led to an amendment of the Bavarian legislation. That legislation still provides that a cross shall be affixed in each classroom. However, it was added that where the parents contradict the affixing of the cross for serious religious or philosophical reasons, the head teacher must try to come to an agreement with them. Where an agreement is not possible, the head teacher is bound to find a solution which respects the rights of the minority.<sup>42</sup> The Federal Administrative Court ruled that the provision had to be interpreted in light of Article 4 of the Basic Law. It argued that in the end the objecting pupils and parents must prevail.<sup>43</sup> This in effect means that the cross has to be removed where they request it.

### 3. Comparison with *Lautsi*

Given that the facts of the two cases are nearly identical, it seems appropriate to draw a short comparison between the FCC's crucifix decision and the decision by the second section of the ECtHR in *Lautsi*. Both courts found that

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<sup>39</sup> Critical on this point: M. Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, Verlag Mohr Siebeck, Tübingen 2006, 478.

<sup>40</sup> Müller-Volbehr, n 35, 998.

<sup>41</sup> Ibid.

<sup>42</sup> Article 7 Bayerisches Erziehungs- und Unterrichtsgesetz (Bavarian Code on Education)

a cross in the classroom was in violation of the negative freedom of religion. However, it appears that the ECtHR's definition of what constitutes negative freedom of religion is not the same as that of the FCC. The ECtHR defines it as the freedom not to believe.<sup>44</sup> In the FCC's understanding of freedom of religion, not holding a belief would be covered by positive freedom of religion. Negative freedom is defined as the right not to have to follow a certain belief and not to be confronted with religious manifestations. While it stated the above definition of negative freedom, it appears, however, that the ECtHR actually applied the FCC's understanding of negative religious freedom, when it said that the State must 'refrain from imposing beliefs'.<sup>45</sup>

Where both courts agreed was that a religious symbol can interfere with the negative freedom of religion where there is no possibility for the pupil to escape.<sup>46</sup> In contrast to the ECtHR, the FCC considered that this interference could be justified by the state's right to organise education, which was not referred to in *Lautsi*. The reason for this probably lies in the absence of any such right being mentioned in the European Convention on Human Rights (ECHR). As has been pointed out by *Augsberg* and *Engelbrecht*, the ECHR is not a full constitution but only contains a number of (individual) human rights.<sup>47</sup> However, where the second section of the ECtHR in *Lautsi* goes further than the FCC is in its unequivocal statement that the state has a duty to (absolute) confessional neutrality in public education.<sup>48</sup> This view is certainly not shared by the FCC, which in the crucifix decision confirmed its

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<sup>43</sup> Bundesverwaltungsgericht, 6 C 18/98 (21 April 1999).

<sup>44</sup> *Lautsi*, para 47 (e).

<sup>45</sup> *Lautsi*, para 48.

<sup>46</sup> ECtHR, n 22, para 55 and BVerfGE 93, 1 (18).

<sup>47</sup> I. Augsberg/K. Engelbrecht, Staatlicher Gebrauch religiöser Symbole im Licht der EMRK, 65 Juristenzeitung (2010), 450, 455.

older case law on Christian schools. It is regrettable that the ECtHR did not at least provide a legal argument why the state has a duty to be completely neutral under the Convention.<sup>49</sup> Should this point of the decision be upheld by the Grand Chamber, this would also have implications for German schools because it would mean that the FCC's sympathy towards some Christian references in schools would no longer be compatible with the ECHR.

What both courts have in common, however, is that they both view the crucifix and the cross as religious symbols. Both courts thus take an objective view when interpreting symbols, which (also) have a religious meaning. Furthermore, both courts highlighted the importance of protecting religious minorities.<sup>50</sup>

#### 4. Cases Involving Teachers

A few years after the FCC's decision, the courts faced the question whether the reasoning would also apply to non-Christian teachers who argued that their negative freedom of religion was affected by having to 'teach under the cross'. In this scenario the main difference between a teacher and a pupil is that teachers are employed by the state as civil servants, which means that they owe the state a degree of loyalty. This duty to loyalty is considered to be one of the 'traditional principles of the professional civil service' mentioned in Article 33 (5) of the Basic Law. Notwithstanding this duty, civil servants are bearers of fundamental rights.

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<sup>48</sup> ECtHR, n 22, para 56.

<sup>49</sup> Augsberg/Engelbrecht, n 47, 456 even regard these statements to be an interference with the Convention states' sovereignty.

<sup>50</sup> ECtHR, n 22, para 55 and BVerfGE 93, 1 (24).

Two decisions by the Bavarian administrative courts are worth mentioning here. The first case was decided by the Higher Administrative Court of Bavaria (*Bayerischer Verwaltungsgerichtshof*).<sup>51</sup> The Court drew an analogy between the situation of a teacher and that of a pupil. It pointed out however, that teachers generally had to comply with their duties, which normally trumped their fundamental right to religious freedom. Furthermore, the personalities of teachers were fully developed and they were thus less likely to be indoctrinated by the cross. This means that teachers generally have to accept the cross in the classroom. The Court therefore chose to adopt the FCC's stance in the case concerning the cross in the courtroom mentioned above and tested whether there existed a situation where it was intolerable for the teacher concerned to teach under the cross. In the case before the Court, the teacher could show that he was not opposed to Christianity as such, but had an aversion to the cross as a symbol. For him, it displayed crucifixion, which in his eyes was the cruellest of all techniques of execution. Furthermore he considered the cross a symbol for anti-Semitism and the Holocaust. The Court found that for this reason it was unacceptable for him to teach classes in front of the cross, so that he could ask for it be removed.

Conversely, in the second case, the Administrative Court of Augsburg found that it was not enough reason for an atheist teacher to politically disagree with the display of the cross. A situation, which did not lead to an

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<sup>51</sup> Bayerischer Verwaltungsgerichtshof, 3 B 98.563 (21 December 2001).

inner conflict for the teacher, does not constitute an atypical case. Thus the Augsburg court denied his claim.<sup>52</sup>

What is remarkable about both decisions, however, is that they offered a new interpretation of the cross in view of the amended legislation. Both courts argued that with the entry into force of the new legislation, the legislator also changed the symbolism of the cross: it was now to be understood as merely a symbol for Christian and Western values, and thus no longer has an appellant character. This reveals a fundamental misunderstanding of the FCC's reasoning in the crucifix case. The FCC explicitly considered the intentions of the state as irrelevant. Rather, it based its findings on the impression the cross left on the addressees of the symbol, i.e. the students. Thus in cases involving teachers, the administrative courts should have considered the addressees as well.

### III. Symbols Worn by Teachers: the Muslim Headscarf

#### 1. The *Ludin* saga

A new facet of the controversy around religious symbols in schools became evident when female Muslim teachers insisted on wearing a headscarf, covering their hair and neck, while teaching. In these types of cases, the fundamental rights situation differs from the crucifix case-law. A court must not only reconcile the negative religious freedom of the pupils with the state's right to educate them and the state's duty to stay neutral in matters of religion and philosophy of life. The court must also take into account the teacher's positive freedom of religion, which gives her a right to wear the headscarf.

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<sup>52</sup> Verwaltungsgericht Augsburg, Au 2 K 07.347 (14 August 2008).



This difficult situation faced the courts in the landmark *Ludin* case.

*Ludin* was a German national, who applied to be employed as a primary school teacher by the *Land* Baden-Württemberg having just completed her teacher training there. As already mentioned, teachers in Germany are normally employed as civil servants. Article 33 (2 and 3) of the Basic Law regulates access to the civil service:

(2) Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.

(3) Neither [...] eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.

Article 33 (2) is designed to ensure a meritocratic system, which results in the best candidate having a subjective right to be chosen for the office.<sup>53</sup>

In the *Ludin* case, the school authority refused to employ Mrs *Ludin* arguing that her insistence on wearing the headscarf in class showed that she lacked the aptitude to perform the job. The authority maintained that as a teacher she had to represent the values of the state, most notably tolerance, which it deemed impossible for a person wearing a headscarf. Furthermore, the authority argued that the wearing of a headscarf by a representative of the state violated the state's duty to be neutral.

#### a. *Ludin* in the Administrative Courts

The authority's decision was upheld by the Stuttgart Administrative Court<sup>54</sup>, the Higher Administrative Court of Baden-Württemberg<sup>55</sup>, and eventually the

Federal Administrative Court<sup>56</sup>. The main argument of the administrative courts can be summarised as follows. One of the criteria when assessing the aptitude of a candidate is a projection of whether they will fulfil their duties. While the Federal Administrative Court acknowledged that the wearing of a headscarf is protected by Article 4 of the Basic Law, it stated that the freedom of religion guaranteed therein could be restricted. In the court's opinion, such a restriction followed from the state's duty to be neutral in religious matters. This duty extended to teachers as well since they acted on behalf of the state. The teacher's personal religious freedom had to stand back in such a case as school was a very sensitive area with young children who were easily influenced.<sup>57</sup> The Federal Administrative Court had no problem finding that the headscarf was a symbol of Islam since it was generally interpreted as an avowal to the Islamic faith. The court admitted that there was no gentle way of resolving the conflict: either the teacher was allowed to wear a headscarf or not. The court refused in particular to allow for a trial period after which the effects of the headscarf on children would be assessed.

What is remarkable about the decision is that it does not once take into account the severe consequences for the teacher. Since the state has a quasi monopoly on primary schools and since there are virtually no publicly funded Muslim primary schools in existence, the decision had the consequence that the appellant would never be able to work as a teacher.

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<sup>53</sup> U. Battis, in: M. Sachs (ed.), *Grundgesetz*, 4th edn., Verlag C.H. Beck, Munich 2007, Art. 33, para 27.

<sup>54</sup> *Verwaltungsgericht Stuttgart*, 15 K 532/99 (24 March 2003).

<sup>55</sup> *Verwaltungsgerichtshof Baden-Württemberg*, 4 S 1439/00 (26 June 2001).

<sup>56</sup> *Bundesverwaltungsgericht*, 2 C 21.01 (4 July 2002).

<sup>57</sup> The argument very much resembles that by the Swiss Federal Court in the Dahlab case, which the ECtHR did not find to be unreasonable, app. no. 42393/98; in two decisions from the 1980's concerning teachers wearing Bhagwan dress, the Federal Administrative

Considering she had spent years studying for her teaching degree and her teacher training, this result was harsh.

Furthermore, it is worthwhile contrasting the reasoning by the administrative courts in the *Ludin* case with the decision of the Lüneburg Administrative Court in Lower Saxony, which in 2000 had to decide a case with nearly identical facts. The arguments advanced by the school authority, which refused to employ the plaintiff, were the same as in *Ludin*. The Lüneburg Administrative Court (Lower Saxony), however, quashed the authority's decision arguing that the teacher's religious freedom need not stand back behind the state's neutrality. In the eyes of the Lüneburg Court neutrality meant that a teacher had to abide by the principle of tolerance when dealing with the different religious and philosophical attitudes which exist in a school. But the tolerance principle did not require a teacher to abstain from any religious avowal when in school. It pointed out that a pluralism of religious convictions was not only existent in schools but was also the aim of Lower Saxony's school legislation. The Lüneburg Court explicitly distinguished the teacher wearing the headscarf from the crucifix decision, where the situation was created by the state.

#### b. *Ludin* Before the FCC - the Majority Opinion

Having lost her appeal to the Federal Administrative Court, Mrs Ludin filed a constitutional complaint to the Federal Constitutional Court. The FCC by a majority of five to three decided that her complaint was well-founded.<sup>58</sup>

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Court (Deutsches Verwaltungsblatt 1988, 698) and the Higher Administrative Court of Hamburg (Deutsches Verwaltungsblatt 1985, 456) argued along the same lines.

<sup>58</sup> BVerfGE 108, 282; an English translation of parts of the decision can be found on the University of Texas' Foreign Law Translations website:

However, it did not finally resolve the controversial question of whether a teacher may wear a headscarf at school. Rather it argued that the denial to employ a teacher on that basis was an interference with her fundamental rights guaranteed in Articles 33 and 4 of the Basic Law, which happened without the necessary legislative basis. Thus the FCC decided on the technical point that the *Land* had failed to pass legislation explicitly requiring teachers to refrain from wearing religious symbols in the classroom.

According to the FCC's so-called doctrine of essentiality (*Wesentlichkeitstheorie*), interferences with fundamental rights must have a legislative basis. The stronger the interference, the more precise that basis has to be. Notably decisions concerning the organisation of schools could not be left to the executive but had to be made by the democratically elected legislator.<sup>59</sup>

Despite its less clear-cut result compared with the crucifix case<sup>60</sup>, the *Ludin* decision contains important remarks about the headscarf as a religious symbol and the right of teachers to exercise their religion. The FCC emphasised that the question whether a ban on the headscarf amounted to an interference with religious freedom, had to be answered from the point of view of the woman wearing it. If she considers that she must wear it in order to comply with her religion, then the ban on the headscarf constitutes an interference. The discussion within the Muslim community whether women are required to wear the headscarf or not, was accorded no relevance here.<sup>61</sup>

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[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=613](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=613).

<sup>59</sup> BVerfGE 108, 282 (312 et seq).

<sup>60</sup> The FCC was even accused of refusing to decide the case by K.-H. Kästner, 58 *Juristenzeitung* (2003), 1178.

<sup>61</sup> BVerfGE 108, 282 (298 et seq).

The FCC therefore stayed in line with earlier case law<sup>62</sup> by choosing a subjective test for the question of whether the wearing of the headscarf falls into the scope of religious freedom. However, when it comes to assessing whether that exercise of the freedom interferes with the negative freedom of religion granted others, in this case the pupils, the FCC opted for an objective test. The FCC held that in contrast to a cross, the headscarf was not in itself a religious symbol.<sup>63</sup> In order to assess whether the headscarf had to be considered as such a symbol, the FCC adopted the perspective of an objective observer.

In this context it is worth mentioning a later decision by the Federal Labour Court concerning a female Muslim social worker employed by a school under a private contract, who insisted on wearing a religiously neutral cap fully covering her hair, hairline and ears while working.<sup>64</sup> The school reprimanded her for violating a provision of the North Rhine Westphalia School Act. This provision was added to the Act after the Ludin case had been decided by the FCC and states that teachers must not wear symbols which call the neutrality of the Land into question.<sup>65</sup> The social worker argued that she did not wear the cap for religious reasons and thus did not violate her duty to wear religiously neutral clothes.<sup>66</sup> The reason she chose to wear the cap at school every day was that she used to wear a headscarf for eighteen years and felt exposed if she did not cover her head. The Court did not follow her argument but adopted an objective approach, preferring an interpretation

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<sup>62</sup> Cf. e.g. BVerfGE 33, 23 (28 et seq).

<sup>63</sup> BVerfGE 108, 282 (304).

<sup>64</sup> BAG 2 AZR 499/08 (20. August 2009).

<sup>65</sup> § 57 Schulgesetz Nordrhein Westfalen.

<sup>66</sup> The Court considered her as a teacher since it was her task to mediate conflicts between students.

which seemed likely to a considerable number of objective observers, i.e. parents and students.<sup>67</sup> This decision shows that the interpretation of a piece of clothing as a religious symbol is not only of relevance where a person wishes to rely on provisions protecting freedom of religion, but also in cases where a person claims that she wears a piece of clothing without religious motivation.

Having established that the headscarf constituted a religious symbols, the FCC drew a clear distinction between the situation in the crucifix decision, where the cross was affixed by the state, and the case before it, where the state was only asked to tolerate the teacher's wearing of the headscarf, which did not lead to an attribution of the symbol to the state.<sup>68</sup> The FCC thus showed that the teacher is protected by religious freedom when wearing the headscarf.

Since the wearing of a headscarf could lead to a conflict with the state's duty to remain neutral in matters of religion and philosophy of life, the students' negative right to religion and the parents' right to educate their children, a restriction of the teacher's right was possible. But the decision could not be left to the executive but had to be made by the democratically elected legislator.

### c. *Ludin* Before the FCC – the Dissenting Opinion

The three dissenting judges criticised that the majority failed to appreciate the specific function of a teacher as a civil servant. As such, a teacher had voluntarily sided with the state and therefore deserved less protection of her

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<sup>67</sup> BAG 2 AZR 499/08 (20. August 2009), para 14.

fundamental rights than her pupils and their parents.<sup>69</sup> They argued that a civil servant only enjoyed fundamental rights in so far as they were compatible with the civil servant's loyalty to the state and other requirements of the job.<sup>70</sup> Thus a teacher who wore a headscarf in school violated her duty to neutrality.<sup>71</sup> The minority maintained that the question of aptitude as contained in Article 33 of the Basic Law should not be confused with an interference with fundamental rights. The minority opinion therefore did not see a need for a legislative solution. The incompatibility of a teacher's headscarf with her duties could be directly derived from the Basic Law.

It is noteworthy, that the minority opinion in effect denies the teacher any right to freedom of religion. Unlike the majority, it did therefore not see a need to balance her religious freedom with the neutrality of the state and the freedom of the pupils and their parents. Rather, the three judges seemed to fully attribute the teacher's conduct to the state and equate the situation with that in the crucifix decision.

#### d. Criticism and Comment

The majority decision was the subject of much criticism. Most commentators at the time seemed to prefer the line of argument advanced by the dissenting minority. Many critics considered the headscarf decision to be inconsistent with the crucifix decision. They argued that the situation was essentially the same since pupils were subjected to a religious symbol in the classroom and

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<sup>68</sup> BVerfGE 108, 282 (305 et seq).

<sup>69</sup> BVerfGE 108, 282 (316 et seq).

<sup>70</sup> Ibid.

<sup>71</sup> BVerfGE 108, 282 (325).

they were unable to escape that symbol.<sup>72</sup> These critics disagree with the FCC's distinction between the cross, which was affixed to the wall of the classroom on behalf of the state, and the headscarf which is worn by a teacher and merely tolerated by the state. This criticism is based on two notions: the first is that a teacher as a civil servant is a representative of the state and is therefore subjected to the same restrictions as the state itself. The second notion is that the emphasis should be placed on the influence which religious symbols have on pupils, infringing on their and their parents fundamental rights.

It is argued here that this view tends to be overly simplistic by neglecting the fact that the teacher is a bearer of fundamental rights, too.<sup>73</sup> The situation differs in a fundamental way from the situation in the crucifix decision. As *Sacksofsky* pointed out, the state's duty to remain neutral in religious and philosophical matters means that the state must not identify with a certain belief.<sup>74</sup> While the affixing of a religious symbol by the state strongly suggests such identification to an objective observer, a religious symbol worn by a teacher does not. Thus the critics tend to block out this additional dimension and reduce the issue to a vertical situation where the state, through the teacher wearing the headscarf, interferes with the negative religious freedom of the pupils and their parents. Furthermore, it is hardly acknowledged that teachers like the applicant do not feel they have a choice

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<sup>72</sup> K.-H. Kästner, case comment, 58 *Juristenzeitung* (2003), 1178 (1179); J. Bader, *Cuius regio, eius religio – Wessen Land, dessen Religion*, *Neue Juristische Wochenschrift* (2004), 3092 (3093); R. Pofalla, *Kopftuch ja – Kruzifix nein? Zu den Widersprüchen in der Rechtsprechung des BVerfG*, *NJW* 2004, 1218; A. Frhr. v. Campenhausen, *The German Headscarf Debate*, *Brigham Young University Law Review* 2004, 665 (688 et seq).

<sup>73</sup> A similar point is made by E.-W. Böckenförde, „Kopftuchstreit“ auf dem richtigen Weg?, *Neue Juristische Wochenschrift* 2001, 723 (commenting on the decisions by the administrative courts).



not to wear the headscarf. For them it is mandatory to do so when they appear in public. Since the state has a quasi monopoly on primary education, the consequence of the minority opinion would have been to deny the teacher access to the profession for which she had been trained for many years.

Comparing *Ludin* with the crucifix decision, it is remarkable that both the majority and the minority had no problem in regarding the presence of a religious symbol in the classroom as an interference with the pupils' negative freedom of religion. This, it is recalled, was still very much contested in the crucifix case.

It has been hinted that the FCC deliberately avoided a clearer decision.<sup>75</sup> It is submitted here that the decision not to fully determine the fate of teachers wearing religious symbols in schools, was the correct one. As is evidenced by both the public and the academic discussion around the headscarf, the dilemma to be resolved is rather delicate. The FCC thereby gives the legislatures a choice between a pluralistic solution, where religious avowals are relatively unrestricted, and a solution closer to *laïcisme*, where every religious avowal outside the context of Religious Education is banned.<sup>76</sup> It is not for a court to decide between these two options. Rather, the principle of democracy demands that such decisions are made by the democratically elected legislature.

## 2. The Reaction of the *Länder* to the FCC's Decision

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<sup>74</sup> U. Sacksofsky, Die Kopftuch-Entscheidung – von der religiösen zur föderalen Vielfalt, *Neue Juristische Wochenschrift* 2003, 3297 (3298).

<sup>75</sup> Campenhausen, n 72, 686 et seq.; Kästner, n 72, 1178 et seq.

<sup>76</sup> BVerfGE 108, 282 (310).

Eight of the sixteen *Länder* reacted and passed legislation designed to outlaw the wearing of headscarves by teachers.<sup>77</sup> The *Länder* concerned opted for different approaches. Berlin chose an unambiguous ban of all religious symbols visibly worn by teachers and other civil servants.<sup>78</sup> Bremen took a less radical stance when legislating that ‘the appearance of teachers in school [...] must not be capable of disturbing the religious and philosophical sentiments of pupils or their parents’.<sup>79</sup> While Berlin opted for a clear cut approach, the Bremen legislation necessitates that each individual case of a teacher wearing a headscarf or another religious symbol would have to be assessed.

This contribution focuses on the legislation passed in the remaining six *Länder*. The reason is that the wording of that legislation appears to privilege Christian and Western traditions. In the *Ludin* case the FCC emphasised that any duty not to wear a headscarf would only be compatible with the non-discrimination provisions of the Basic Law if members of different religions were treated equally.<sup>80</sup> The Baden-Württemberg legislation, for instance, provides that:

Teachers at public schools [...] must not make political, religious, philosophical or similar avowals, which are capable of endangering or disturbing the *Land's* neutrality vis-à-vis pupils and parents or a politically, religiously or philosophically peaceful school environment. [...] The realisation of the educational mission in accordance with [the] constitution of Baden-Württemberg and the accordant portrayal of Christian

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<sup>77</sup> Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia, and Saarland.

<sup>78</sup> § 2 of the Gesetz zu Artikel 29 der Verfassung von Berlin (Gesetz- und Verordnungsblatt für Berlin S. 92, Nr. 4).

<sup>79</sup> § 59 b Bremisches Schulgesetz (28 June 2005, Bremisches Gesetzblatt S. 245); translation by the author.

<sup>80</sup> BVerfGE 108, 282 (313).

and Western cultural and educational values does not contradict the conduct required of teachers [described above].<sup>81</sup>

In a similar vein, the Bavarian legislation states:

External symbols or clothes, which express a religious or philosophical conviction, must not be worn by teachers in class as far as pupils or parents can perceive these symbols or clothes as an expression of an attitude which is incompatible with the core values and the educational aims of the constitution, including Christian and Western educational and cultural values.<sup>82</sup>

The other *Länder* chose similar formulations.

At least in some of the *Länder* the intention of including the references to Christian and Western culture was clear: it should enable a ban on the headscarf while at the same time enabling nuns or monks teaching in public schools while wearing their habit.<sup>83</sup> That a nun's habit would normally be covered by the ban is clear since it is an expression of a religious conviction. Therefore, the reference to Christian and Western values has given rise to challenges of that legislation in the courts. On the basis of the newly phrased provision in Baden-Württemberg, Mrs *Ludin* lost her final appeal before the Federal Administrative Court.<sup>84</sup> One of her arguments was that the legislation was unconstitutional because it violated the principle of equal treatment contained in Article 3 of the Basic Law. The Federal Administrative Court interpreted the provision in the same way as the FCC construed similar

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<sup>81</sup> § 38 Schulgesetz für Baden-Württemberg (Gesetzblatt 2003, 359); translation by the author.

<sup>82</sup> Article 59 Bayerisches Gesetz über das Erziehungs- und Unterrichtswesen (Gesetz- und Verordnungsblatt 2004, 443); translation by the author.

<sup>83</sup> Cf. the debate around the Baden-Württemberg provision; quotes supporting the view that a nun's habit will still be admissible can be found in: Landtag Baden-Württemberg, 4 February 2004, Plenarprotokoll 13/62, 4399; 1 April 2004, Plenarprotokoll 13/67, 4700, 4704, 4710, 4717, 4719); a similar view is taken in Bavaria, cf. the information provided by the Bavarian school ministry to head teachers on 'Islam in Schools', which expressly states that the habit of nuns is not affected by the legislation as it is a reflection of the Christian and

references in its school decisions.<sup>85</sup> The reference to Christian and Western cultural and educational values did not refer to Christian doctrine and the religious belief as such but to the values, which originated in Christianity, but which are universally valid, even outside the religious context, e.g. the protection of human dignity, non-discrimination between the genders or religious freedom.

The provisions of most other *Länder* have in the mean time been subjected to challenges of compatibility with the Basic Law. All of them have been upheld on the basis of similar arguments as the ones used by the Federal Administrative Court in the second *Ludin* case.<sup>86</sup> The FCC has not yet been called upon to decide.

The only court deviating from this line of argument was the Bavarian Constitutional Court, which upheld the Bavarian provision on different grounds.<sup>87</sup> With view of the principle of equal treatment, the court stated that the legislation did not contain an objectionable privilege for the Christian belief since the reference had to be understood as meaning Christian values independent of the actual doctrine. The court nonetheless concluded that some symbols may be in accordance with these values and others may not. Thus some symbols and some types of clothing may be worn by teachers, and others may not.<sup>88</sup> The latter statement deviates from the statements made by the courts in other proceedings. The Bavarian court does not refer

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Western values mentioned

(<http://www.stmuk.bayern.de/km/lehrerinfo/thema/2005/02514/index03.asp>).

<sup>84</sup> Bundesverwaltungsgericht 2 C 45/03 (24 June 2003).

<sup>85</sup> Bundesverwaltungsgericht 2 C 45/03 (24 June 2004).

<sup>86</sup> The Hessian provision was upheld by the Hessian Constitutional Court, Staatsgerichtshof des Landes Hessen, P. St. 2016 (10 December 2007); the North Rhine-Westphalia provision was upheld by the Federal Labour Court, 2 AZR 55/09 (10 December 2009) and by the Düsseldorf Administrative Court, 2 K 6225/06 (5 June 2007).

<sup>87</sup> Bayerischer Verfassungsgerichtshof, Vf. 11-VII-05 (15 January 2007).

to a need for an interpretation in conformity with the constitution resulting in all religious symbols being illegal. Rather, the court appears to accept that some unequal treatment is permissible in view of the Christian and Western heritage of Bavaria. The court saw no need to elaborate further on these statements since the complaint was a popular complaint by which everyone may have Bavarian legislation reviewed by the court as to its compatibility with the fundamental rights contained in the Bavarian constitution without there being an actual set of facts.<sup>89</sup> One can easily conclude, however, that the court would be generally willing to accept the ban on the headscarf and permit Christian or Jewish religious clothes or symbols worn by teachers at the same time. It is submitted that the Bavarian approach would not be adopted by the Federal Administrative Court or the FCC.

### 3. Challenges under Equality Law

So far, this contribution has focused on violations of freedom religion guaranteed under Article 4 of the Basic Law. However, in light of the fact that many cases under English law would be argued under anti-discrimination law as well, it seems apposite to briefly address the courts' reactions to arguments based on equal treatment provisions both in the Basic Law and in the federal legislation implementing the EU's equal treatment directives (Allgemeines Gleichbehandlungsgesetz – AGG), which entered into force in August 2006, i.e. after the second *Ludin* decision.<sup>90</sup> Article 3 of the Basic Law

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<sup>88</sup> Ibid, paras 60-61.

<sup>89</sup> Article 98 Bavarian Constitution.

<sup>90</sup> Allgemeines Gleichbehandlungsgesetz (Act Implementing European Directives Putting Into Effect the Principle of Equal Treatment) of 14 August 2006 (BGBl. I S. 1897); an English translation can be found at: <http://www.antidiskriminierungsstelle.de/RedaktionBMFSFJ/RedaktionADSen/PDF->

guarantees a right to equal treatment. Furthermore, Article 33 (2)<sup>91</sup> of the Basic Law is also an equal treatment provision. The FCC in *Ludin* regarded the refusal of the school authority to employ Mrs *Ludin* as an interference with her right to equal access to a public office and emphasised that such interference could not be justified in the absence of an explicit legislative basis. The FCC then stressed that any such legislation would have to guarantee equal treatment of all religions.<sup>92</sup>

After the entry into force of the legislation implementing the EU's directives on equal treatment, applicants were able to rely on these provisions alongside those of the Basic Law. Since the legislation banning religious symbols was passed by the *Länder*, their legislation had to be compliant with federal law.<sup>93</sup> Furthermore, any dismissal of an employee or refusal to employ them must not infringe the AGG. This is also true where civil servants are concerned since § 24 AGG provides that the Act also applies to the public sector. The AGG has unsuccessfully been invoked in a number of cases concerning the headscarf. The discriminations on grounds of religion were deemed justified in each instance.<sup>94</sup>

In the case of the social worker, mentioned above, the Federal Labour Court admitted a direct discrimination on the basis of religion but considered that discrimination to be justified under § 8 AGG, which provides that a

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Anlagen/2009-08-28-agg-englisch-neues-design,property=pdf,bereich=adsen,sprache=en,rwb=true.pdf [12 November 2010].

<sup>91</sup> Quoted above.

<sup>92</sup> BVerfGE 108, 282 (313).

<sup>93</sup> Article 31 of the Basic Law provides that 'Federal law shall take precedence over *Land* law'.

<sup>94</sup> VGH Baden Württemberg, 4 S 516/07 (14 March 2008); VG Düsseldorf 2 K 6225/06 (5 June 2007).

‘difference of treatment [...] shall not constitute discrimination where, by reason of the nature of the particular occupational activities or of the context in which they are carried out, such grounds constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’<sup>95</sup>

The Federal Labour Court considered the restriction to serve a legitimate purpose, namely the preservation of a peaceful school environment. It was also deemed proportionate since the ban would only affect her during the school day and since it served the purpose of protecting the negative freedom of religion of others.<sup>96</sup>

In another case a female Muslim Turkish language teacher was dismissed for insisting on wearing the headscarf in class even though she only taught pupils of Turkish origin all of whom were Muslims. The Federal Labour Court upheld the dismissal with the same reasoning as in the case just discussed and regarded the discrimination to be justified.<sup>97</sup>

What is remarkable about these two cases is that the Federal Labour Court, without any discussion, adopted the reasoning by the Administrative Courts that such discrimination can be justified without taking into account the fundamental difference between a teacher or social worker who is employed under private law and a civil servant. While there is some room for the argument that a civil servant represents the state and therefore has to accept more far-reaching restrictions of their fundamental rights, this is not the case for ‘normal’ employees.

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<sup>95</sup> The Act thereby mirrors the formulation found in Article 4 of EU Directive 2000/78/EC, OJ L 303/16 (2 December 2000).

<sup>96</sup> BAG 2 AZR 499/08, para 26 et seq.

<sup>97</sup> BAG 2 AZR 55/09.

Furthermore, upholding the dismissal of the Turkish language teacher who only taught Muslims, goes rather far. As is evident from paragraph 23 of the preamble to Directive 2000/78/EC, on which the AGG is based, discrimination can only be justified in 'very limited circumstances'. It is submitted that the Federal Labour Court failed to appreciate the very exceptional nature of the justification provision in this case.

It is further noteworthy that none of the decisions mentions § 4 AGG, which deals with multiple discriminations and requires a justification under all those grounds. In the case of the ban on the headscarf, the courts are not only confronted with a potential discrimination on the basis of religion but also an indirect discrimination on the basis of gender.<sup>98</sup> This failure to appreciate the existence of multiple discriminations in these cases is evidence of a slightly underdeveloped anti-discrimination jurisprudence by the German courts.

#### 4. Overall Comment

The *Ludin* decision, albeit much criticised, has led to a certain degree of legal certainty with regard to religious symbols and religiously inspired clothing worn by teachers. Where a *Land* wishes to ban such symbols, they must do so by way of legislation and must not discriminate between religions. With the exception of the Bavarian Constitutional Court, all courts held that a reference to the *Land's* Christian and Western heritage could not lead to a privileging of Christian and Western religious convictions. Rather, this reference must be understood to mean that the Western values marked by Christianity are to



inspire teaching but that there must not be any indoctrination of Christian religious content.

The legislation of the eight *Länder* has created a situation for schools and teachers, which comes quite close to *laïcisme*. They are effectively banned from avowing to any religious belief when in school. To some observers this may seem ironic since the legislation, which contains explicit references to the Christian and Western heritage, was passed by *Länder* parliaments with a strong conservative majority consisting mainly of Germany's Christian parties.<sup>99</sup>

#### IV. Symbols Worn by Students: Any Room for Regulation In View of Religious Freedom?

The final point which this contribution briefly aims to address is the situation of pupils. At present there is no legislation or executive practice banning students from wearing religious symbols in schools. Yet the political discussion revolving around immigration and integration has recently seen some politicians and commentators call for a ban of the headscarf even for pupils.<sup>100</sup> According to media reports, a few head teachers have tried to ban

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<sup>98</sup> Cf. Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, Hart, Oxford 2008, 161.

<sup>99</sup> E.g. the Christian Social Union in Bavaria and the Christian Democratic Union in Hesse, Baden-Württemberg, Lower Saxony, North Rhine Westphalia, Saarland.

<sup>100</sup> E.g. L. Akgün, Nicht for dem 14. Jahr, in: *Emma* (Sept/Okt 2009), pleading for a ban for under 14 year olds <http://www.emma.de/hefte/ausgaben-2009/inhalt-emma-2009-5/lale-akguen-2009-5/>; T. Sarrazin, *Die Welt Online*, Sarrazin fordert Kopftuchverbot für Schülerinnen, 12 December 2009, <http://www.welt.de/politik/deutschland/article5507124/Sarrazin-fordert-Kopftuchverbot-fuer-Schuelerinnen.html>.

the headscarf in their schools.<sup>101</sup> But in each case the school authorities were quick to lift the ban.

Viewed from the perspective of the law it would be very difficult to achieve such a ban in a constitutional manner. The *Ludin* case showed that a ban of the headscarf for teachers would require a legislative basis and could not merely be imposed by the executive. Since the interference with the pupil's freedom of religion would be at least as strong, there is much reason to believe that any such ban for pupils would have to be passed by the legislature. Of course, a ban on the headscarf only would not be possible either. With view of Article 3 of the Basic Law, which prohibits discrimination, the legislation would have to treat all religions equally and ban all religious symbols.<sup>102</sup>

But even if that were to happen, such a ban would probably be considered an unconstitutional interference with the students' freedom of religion by the FCC. That there would be an interference with that freedom is clear from the *Ludin* case and needs no further discussion. When it comes to justifying that interference, the fundamental difference between a teacher and a pupil in school would become pertinent. Pupils, at least until they have completed nine years of schooling,<sup>103</sup> are subjected to compulsory education. This means that they have to attend school. If they were not allowed to wear the headscarf in school, this would in effect result in the state forcing them to violate their religious duty, which would constitute a grave interference with their freedom of religion. This interference could only be justified to protect

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<sup>101</sup> Cf. 'Wie Rektoren das Kopftuchverbot ausweiten wollen', Spiegel Online, 16 October 2008, <http://www.spiegel.de/schulspiegel/wissen/0,1518,584023,00.html>.

<sup>102</sup> Even then there might be problems with indirect discrimination in violation of the EU Equality Directives.

other colliding constitutional principles, such as the fundamental rights of others. In contrast to a teacher, where the neutrality of the state in religious and philosophical matters constitutes such a colliding principle, it would be hard to find a pressing interest to justify a similar ban for students. As has been pointed out, German secularism is not to be confused with *laïcité*. Thus the reasoning of the Turkish state justifying the ban of the headscarf in Turkish universities in the Şahin case before the ECtHR would not work in the case of Germany.<sup>104</sup>

One argument for a ban would be to consider it necessary to protect young girls from being forced to wear the headscarf. Apart from the difficulties of distilling the state's duty to protect pupils from the Basic Law,<sup>105</sup> this would have to be squared with the parents' right to bring up their children according to their religious, which is guaranteed by the Basic Law. This right inevitably involves a degree of religious indoctrination. Thus a ban on the headscarf for pupils would interfere with their parents' rights as well.<sup>106</sup>

This line of argument finds some confirmation in the Federal Administrative Court's decision on the right of a Muslim pupil not to be forced to take part in classes of physical education where boys and girls are taught in mixed classes.<sup>107</sup> The court acknowledged that the state has a right to educate pupils arising from Article 7 of the Basic Law and that this right was of equal weight as the pupil's religious freedom, which demanded that she had

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<sup>103</sup> The length of compulsory education differs between the *Länder*.

<sup>104</sup> App. no. 44774/98 (Şahin v Turkey), para 116.

<sup>105</sup> Cf. a report by the legal service of the German Bundestag WD 3 - 3000 - 046/10 (not published), which argues that there is no general duty of the state to actively protect women from being forced by their husbands to wear a burqa.

<sup>106</sup> The same result – that a ban would be unconstitutional – is reached by J. Kokott, in: M. Sachs (ed.), Grundgesetz, 4th edn., Verlag C.H. Beck, Munich 2007, Art. 4, para 59.

<sup>107</sup> Bundesverwaltungsgericht, 6 C 8/91 (25 August 1993).

to wear wide dresses and a headscarf so that male pupils would not be able to see her body shape. However, the court held that the state would have had the choice of teaching physical education in single sex classes. Thus the pupil's right to freedom of religion prevailed.

## V. Conclusion

The controversies surrounding religious symbols in schools are proof of Germany's pluralistic society. Since politicians tend to shun making decisions, which affect people's religion, these controversies are often decided in the courts. As a result there is now a relatively settled case law on religious symbols. The courts interpret these symbols from the point of view of an objective observer. However, when deciding whether a religious symbol is compulsory for the person wearing it, the courts adopt a subjective test. Furthermore, the courts now seem to accept that a religious symbol can interfere with other people's negative freedom of religion. The situation for teachers wearing a headscarf, has been clarified to a large extent. In the *Länder* which introduced a ban on the headscarf, teachers have no right to be employed and those who are employed can be dismissed if they insist on wearing it in class. In the *Länder* which did not legislate for a ban, it is clear from the *Ludin* case that teachers are allowed to wear it. This fragmentation of the legal situation in the different *Länder* is regrettable but inherent in a federal system. The only way in which teacher wishing to wear a headscarf in schools might still be successful is under the EU's anti-discrimination law. As this contribution has shown, the case law of the German courts in this respect is not developed in a very sophisticated manner. It is only a matter of time

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until the Court of Justice of the European Union will be asked to decide on these questions, too.